County Development. This hearing is called at the request of the Citizens Committee for the purpose of presenting this plan to the County, and determining if the county is ready to support it. All interested persons are hereby notified of said hearing and are invited to attend. A draft of the ordinance and maps are available for inspection at Planning and Zoning Commission's office in the County Building, Easton." The minutes of the Commission show that this public hearing was held as advertised on April 27, 1953, that an estimated five hundred people attended, and that a special meeting of the Commission was held immediately following the public hearing. It was the opinion of the Commission, Mr. Dulin voting in agreement, "that a very great majority of those attending the open meeting were in favor of the plan presented and those attending represented the great bulk of the County." The Commission therefore voted to recommend the plan as presented at the public hearing to the Commissioners. Appellants' objection to the meeting of April 27th seems to be that it was conducted by the Citizens Committee for Talbot County rather than by the Commission. Mr. Voshell, a member of the Commission, testified that he conducted the public hearing of April 27th. Offered in evidence was a letter to the Commissioners from Mr. Voshell, temporary chairman, stating that the Commission voted unanimously to recommend the plan presented at the public hearing of April 27th and that a great majority of those present at the meeting were in favor of the plan. The letter further stated: "Please therefor consider this our formal recommendation of the attached plan and the maps dated, April 28, 1953."

The Commissioners by advertisement printed in the Easton Star-Democrat once in each of three successive weeks before the fifteenth day of May, 1953, gave notice of a public meeting to be held in the Easton Armory on May 16, 1953, for the purpose of a discussion of the enactment of an ordinance, including a map of a master plan for the zoning of Talbot County. In addition to the notice of this meeting, the full text of the proposed Ordinance was published for two successive issues in the Easton Star-Democrat. At the public meeting in the Armory on May 16th approximately

one thousand people were present. The large majority of those present were in favor of the proposed Ordinance. It therefore appears that the necessary public hearings were held on the Zoning Ordinance.

Code, 1951, Article 66B, supra, Section 17, provides in part: "Before the adoption of the plan or any such part, amendment, extension, or addition the Commission shall hold at least one public hearing thereon, notice of the time and place of which shall be given by one publication in a newspaper of general circulation in the municipality."

The testimony shows that after this second public meeting the Commissioners met and made certain very minor changes in the Ordinance. Appellants contend that the Commissioners had no power to change the Ordinance after the public meetings and that it should have been adopted in exactly the same form as there presented. Of course, the object of the public hearing was to give the public an opportunity to criticize and recommend changes in the Ordinance. It could hardly be contended that, if the Commissioners decided to make minor changes in the Ordinance, public meetings would have to be continuously held until the Ordinance was submitted in its exact final form. It is evident that these minor changes were not substantial and did not violate the intent of the Enabling Act. The same contention was made in the case of *Town of Burlington v. Dunn*, (Mass., 1945), 61 N. E. 2d 243. It was there said: "There is nothing in the statute requiring another hearing whenever, as the result of one hearing, the board decides to amend what had previously been proposed. The amendments were not of a fundamental character."

Appellants further contend that the zoning maps are uncertain, indefinite, self-contradictory and irreconcilable. It is admitted that there are some slight errors in these maps where certain lines over-lap and minor areas contain wrong colors. The zones are "reasonably capable of comprehension." *Mallett v. Village of Mamaroneck*, 123 N. Y. S. 2d 249; *Auditorium, Inc. v. Board of Adjustment*, (Del.), 91 A. 2d 528. However, none of these defects in any way affect appellants' property. These errors could be corrected by

administrative action of the Commissioners. Article 66B, supra, Section 21(e), provides in part: "(Changes.) Such regulations, restrictions and boundaries may from time to time be amended, supplanted, changed, modified or repealed." Such minor irregularities will not vitiate zoning ordinances. *Speroni v. Board of Appeals of City of Sterling*, 368 Ill. 568, 15 N. E. 2d 302. There is no claim here that anyone had difficulty in determining the zoning of his property.

As to the contention that the Zoning Ordinance as finally adopted did not provide for an Appeal Board and for appointment of its members, Section IX of the Zoning Ordinance provides for the powers and duties of the Appeal Board and the procedure of that Board. As hereinbefore decided, the Appeal Board was legally appointed prior to the adoption of the Zoning Ordinance on May 16, 1953. As hereinbefore stated, the Commissioners legally created the Appeal Board. There is no requirement in Article 66B, Section 22, supra, that the Appeal Board be created by ordinance.

Appellants interpret the first sentence of Article 66B, Section 21(d), supra, to require the issuance of permits and provisions for enforcement of the Ordinance and claim that there are no such provisions in the Ordinance. The section relied on says nothing about permits and provides that the Commissioners may prescribe the manner in which the regulations may be enforced. Pursuant to Article 66B, supra, Section 34, Section XIV of the Zoning Ordinance provides penalties for its violation.

Of course, as contended by the appellants, powers granted to county commissioners should be strictly construed. *Barnett v. Co. Commissioners for Charles Co.*, ... Md. ....., 112 A. 2d 492. Judge Hammond said for this Court in the case of *Crozier v. Co. Commissioners Prince George's Co.*, 202 Md. 501, 97 A. 2d 296: "The power of the County Commissioners of Prince George's County to zone or rezone is one that they have only by statutory delegation and can be exercised only to the extent and in the manner the legislature has said that it may be. * * * The requirements of the

ordinance are binding on the Commissioners sitting as a District Council and they may exercise their zoning powers only by following the procedure specified; this is implicit, if not explicit, in Sections 985 and 988 of the Prince George's County Code and Sections 4 and 5 of Article 66B of the Code (1951 Ed.). The cases spell out the necessity of substantially complying with legislative procedural and substantive prerequisites as to notice and hearings if the action of zoning authorities is to be valid. *Heath v. Mayor & C. C. of Baltimore*, 187 Md. 296, 49 A. 2d 799; *Louisville & Jefferson County Planning and Zoning Commission v. Ogden*, 307 Ky. 362, 210 S. W. 2d 771; *Watkins v. Gromley*, Sup., 59 N. Y. S. 2d 747; *Yokley, Zoning Law and Practice*, Section 79 and Section 109; and *Bassett, Zoning*, p. 36." In *Heath v. Mayor & City Council of Baltimore*, supra, the State Enabling Act and the City Zoning Ordinance required that notice be given of application for permits. The contention was made that the property had not been properly posted. This Court there said: "A substantial compliance with the requirements of an administrative regulation in making an application for a permit is sufficient. *People v. Village of Oak Park*, 268 Ill. 256, 109 N. E. 11; *State ex rel. Grimmer v. City of Spokane*, 64 Wash. 388, 116 P. 878." For the reasons herein stated we are of opinion that the procedure followed the enabling legislation sufficiently to make the Zoning Ordinance valid.

It is strenuously contended by the appellants, adjoining property owners, that it is unconstitutional to prevent them from using their property for industrial purposes. It has been well settled in this State that, where a constitutional question is involved, equity may intervene and enjoin the action of an administrative body. This, of course, is not favored where statutory remedies permit the raising of such questions. *Kahl v. Consolidated Gas, Electric Light & Power Co.*, 191 Md. 249, 258, 60 A. 2d 754; *Francis v. MacGill*, 196 Md. 77, 75 A. 2d 91; *Kracke v. Weinberg*, 197 Md. 339, 79 A. 2d 387.

Of course, the power of the government to interfere by zoning regulations with the general rights of the land owner

in restricting the character and use of his property is not unlimited and those rights are within the protection of the Constitution, Federal and State. *Eubank v. City of Richmond*, 226 U. S. 137, 57 L. Ed. 156; *Nectow v. City of Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A. L. R. 654; *City of Baltimore v. Cohn*, 204 Md. 523, 105 A. 2d 482. However, all uses of property which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power results in inconvenience or loss to certain persons. In those cases, individual rights are subordinate to the higher rights of the public. The exercise of this police power is an essential attribute of sovereignty. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; *Euclid, Ohio v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303; *Zahn v. Board of Public Works*, 274 U. S. 325, 71 L. Ed. 1074; *Leventhal v. District of Columbia*, 69 App. D. C. 229, 100 F. 2d 94.

The appellants, in order to sustain their contention, presented testimony that the land sought to be industrialized consists of approximately 836 acres in the Bay Hundred District of Talbot County adjoining the Chesapeake Bay. This land has been used for agricultural and residential purposes for many years. It has not been used for any other purposes. Thirty acres is in marsh land and a small portion is cut-over woodland. The marsh land at one time was used for a terrapin pen. This land for some years has been rented to tenants on a share crop basis, the tenants changing from time to time. As a result the property has been unprofitable and the income therefrom has not equalled the amount of taxes. In fact, 257 acres of this land has not been farmed for at least four or five years. There is no testimony before us to show that by adequate and modern farming operations appellants' land could not be as profitable as other lands in Talbot County. Like all other property bordering the Chesapeake Bay there has been some erosion along the waterfront. In February, 1953,

about two months before the Zoning Ordinance was finally adopted, it became known that the Pan American Refining Corporation was considering locating an oil refinery in the Bay Hundred District which would take in the property of the appellants here. On May 20th or 23rd, 1953, after the enactment of the Zoning Ordinance, the Commissioners of the Town of St. Michaels in the Bay Hundred District and the Pan American Refining Corporation filed an application to rezone property, including that of the appellants, industrial rather than agricultural. In September, 1953, this application was withdrawn as Pan American had decided to locate in Virginia.

Appellants produced expert witnesses who testified that the property was the most suitable site for general modern industry on the Atlantic Seaboard between Sandy Hook and Cape Charles which had not already been occupied by industry or by the military services. The depth of the water and the nature of the shore line was such that it was economically practical to construct a large deep water port with sufficient depth to accommodate the largest ocean-going vessels. At the argument in this Court it was admitted that the water for a distance of approximately one-half mile from appellants' property is only three or four feet deep and that no better harbor now exists at this location than at any other exposed waterfront on the Chesapeake Bay. According to appellants' witnesses, in order to create a harbor it would be necessary to spend approximately five million dollars for dredging. This dredging would create from 1000 to 1375 acres of new land. To provide the necessary pier facilities would cost approximately fifteen million dollars. An oil refinery at this location would cost approximately fifty million dollars. It is shown by hydrographic charts that many other areas in this general locality could be made into deep water ports by the expenditure of practically the same amount of money as would be necessary here. In fact, some of the same facilities are available at Wade Point only a few miles distant from appellants' property.

Another expert witness, produced by the appellants, testified that water tests on their property showed a water

supply beneath the surface, sufficient to produce twenty million gallons of water a day, which was adequate for a large oil refinery or other heavy industry, without probable effect on the water now used in that area. However, it was admitted that in order to produce this amount of water it would be necessary to put in ten wells which would require an area of from 6½ to 7 miles, which is larger than appellants' property. However, this expert witness admitted that this same water supply ran all the way across the whole Eastern Shore of Maryland and out-cropped in the ocean beyond the Continental Shelf and that this water supply was not peculiar to appellants' property. Appellants also stress the fact that their property, with adequate waterfront, is near railroads and good highways. Maps offered in evidence show other locations in Talbot County with adequate water front near railroads and good highways. From the testimony and exhibits it could be reasonably found that appellants' property was no more suitable for a deep water port than many other locations along the Chesapeake Bay with the expenditure of the same amount of money required here. Appellants stress the fact that they obtained a Necessity Certificate from the Office of Defense Mobilization on February 3, 1955. The only effect of this Certificate is the declaration by the Office of Defense Mobilization that the installation is essential in national defense, and that a five year tax write off would be granted by the Government. These certificates are intended to encourage people to disperse industry in order to aid the national defense. To encourage such dispersement the income tax advantage is given. It appears that the Certificate here was issued for a period of six months only. If construction is not started within that time or an explanation made why it has not been started, the Certificate will be cancelled.

Under the Zoning Ordinance, appellants' property is zoned for agriculture, home occupation, single family dwellings, guest houses, boarding houses and employee housing, among other things. The fact that appellants' property is less profitable, being used for agricultural or residential rather than industrial purposes, is not a sufficient basis for holding that the police power has been improperly exer-

cised. Where the uses of property are detrimental to the public health, safety, morals or general welfare, such uses may be prohibited even though it will result in inconvenience or loss to individuals. These individual rights are subordinate to the higher rights of the public. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 A. 547; *Carney v. City of Baltimore*, 201 Md. 130, 93 A. 2d 74. In the case of *Kracke v. Weinberg*, supra, strongly relied on by the appellants, it was stated that the value of the land for sale or lease was undoubtedly much less when it was restricted to residential uses and, although this is true of all property affected by residential zoning, too much weight could not be given to the fact that the value of the land is thereby decreased. It was said in *Easter v. City of Baltimore*, 195 Md. 395, 73 A. 2d 491: "The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. *Garden View Homes v. Board of Adjustment*, 137 N. J. L. 44, 57 A. 2d 677." See also *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649; *American Oil Company v. Miller*, 204 Md. 32, 42, 102 A. 2d 727; *Zahn v. Board of Public Works*, supra. In such cases as *N. W. Merchants Term. v. O'Rourke*, 191 Md. 171, 60 A. 2d 743, *Hoffman v. City of Baltimore*, 197 Md. 294, 79 A. 2d 367; *Kracke v. Weinberg*, supra; and *City of Baltimore v. Cohn*, supra, it was found that the property could not reasonably be used for the purposes for which it was zoned. An expert witness for appellants gave a very high estimate as to the value of appellants' land. In *Anne Arundel County v. Ward*, (1946), 186 Md. 330, 46 A. 2d 684, the denial of the right to erect certain types of houses in a residential area, contrary to the zoning regulations, was upheld. In *Anne Arundel County v. Snyder*, (1946), 186 Md. 342, 46 A. 2d 689, the denial of the right to build a show room and store room and the construction of a dock, forbidden by the zoning ordinance, was affirmed. In *Zang & Sons, Builders, Inc. v. Taylor*, (1954), 203 Md. 628, 102 A. 2d 723, the denial for the erection of an open air drive-in motion picture theatre in a "Cottage Residential" area was upheld. In *American Oil Company v. Miller*, (1954), supra, the erection of a gasoline filling station in an agricultural area on the Ritchie

Highway, near Annapolis, was denied. In *Temmink v. Board of Zoning Appeals for Baltimore County*, (1954), 205 Md. 489, 109 A. 2d 85; *Waitman Zinn, et al v. Board of Zoning Appeals of Baltimore County, et al*, No. 138, This Term, ... Md. ....., ... A. 2d .....; and *Schiff, et al v. Board of Zoning Appeals of Baltimore County, et al*, No. 143, This Term, ... Md. ....., ... A. 2d ....., the erection of shopping centers in residential areas was denied.

There is testimony that many of the people in the Bay Hundred District are strenuously opposed to zoning and to the prohibition of industrial uses in that District. Exercise of the police power in zoning regulations cannot be governed "by a plebiscite of neighbors or for their benefit." *Benner v. Tribbitt*, 190 Md. 6, 20, 57 A. 2d 346. Testimony was offered by the appellees which shows that Talbot County is essentially a rural area of about 20,000 people, approximately 10,000 of whom live in Easton, the County Seat. The remaining 10,000 live on farms or in small country towns and get their livelihood from the land, or water. For perhaps three hundred years this County has grown slowly in population and is a very harmonious development. The economy has been balanced between light industry, agriculture and services for the agricultural population. Practically all of the population works directly or indirectly in the production of farm produce and products or in processing those products. Practically everybody seeking employment is employed. There is only about five percent of unemployment and no floating labor supply. This County has been practically immune to depression because the people live primarily off the land and in towns catering to the wants of the people on the farms.

Early in 1951, the bridge across the Chesapeake Bay being imminent, zoning was deemed advisable by many residents of Talbot County. Mr. Irving C. Root, a professional planner experienced in zoning, was employed. He has been engaged in planning work since 1918. From 1927 to 1940 he was chief engineer of the Maryland National Capital Park and Planning Commission and prepared a master plan for suburban Washington which consisted of

three hundred square miles in Montgomery and Prince George's Counties. He was City Planning Consultant for the United States Department of Interior. He made exhaustive land use study and a field survey in Talbot County. He started work there in November, 1951, and continued practically continuously until January, 1954. He stated that the Zoning Ordinance finally adopted was based on a comprehensive plan. The question of industrial opportunities in Talbot County was studied and he testified that under the Zoning Ordinance fifty times more industrial area is provided in Talbot County than now exists as active industry, and that an extremely large amount of commercial and industrial property has been added. Transportation facilities have been considered in zoning the industrial areas. He said: "Through many years industry has developed in certain places in Talbot County, and those places were considered as the logical place for more industrial expansion, and that's why the areas where the canneries are is enlarged so that they could have more canneries. The seafood packing places on the water-front were enlarged so they could have large expansion. Beyond that it would be merely visionary as to where you would put additional industrial zones." He further said that ample provision had been made for enormous industrial expansion.

Numerous public meetings were held throughout the County to discuss the Zoning Ordinances. That Ordinance adopted by the Commissioners reflected not only competent professional study, but consideration over a long period of time by the Commission and the general public. The Ordinance, as adopted, was consistent with the fundamental framework of the County's economic and social life and such as to promote the health, safety and general welfare of its citizens. It is settled law that where a legislative body, using properly the powers given it by the Legislature, has adopted a zoning ordinance, its exercise of the police power is presumed to be valid. A successful attack upon such an ordinance must show affirmatively and clearly that it is arbitrary, capricious, discriminatory or

illegal, so that necessarily a review by a court is narrow in scope. *Anne Arundel County v. Ward*, supra. We cannot find grounds here for successful attack upon the Ordinance as a whole.

To appellants' earnest contention that even though the Ordinance be held validly adopted, and to be generally applicable and effective, nevertheless, as applied to their property, it is so arbitrary and unreasonable as to be unconstitutional, we find the answer to be that the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted, and that, therefore, they have no just claim for relief. The testimony shows that the appellants' property does not differ from other farm land in the vicinity. An experienced real estate man testified for the appellees that he had known the property for many years and that it was "a lovely place to live." He added that if appellants' land were zoned industrial and no industry was established, other property in the neighborhood would be depreciated. He, undoubtedly, had in mind the well-known fact that many of the Talbot County farms have been bought for and used as country estates. He admitted on cross-examination that it was possible that an industrial market might open up which would make the land of greater value. The fact that by the expenditure of many millions of dollars, appellants' land could be made attractive to commercial users, does not amount to a valid showing that the zoning restrictions are arbitrary and unreasonable as applied to land which under such restrictions may be used for many purposes for which it is adapted, such as farming, sub-division, a country estate, a guest house or a boarding house. In *Baltimore City v. Cohn*, supra, where there was a finding of arbitrary and unreasonable zoning, as applied to a particular lot, the controlling principles were succinctly set forth as follows: "It is recognized that although a zoning ordinance is not invalid *per se*, yet when the provisions of such an ordinance come to be applied to particular premises, it may be found to be clearly arbitrary and unreasonable. A particular provision or application of a zoning ordinance may be held invalid where it restricts property to uses for which

it is not adapted. A zoning restriction may be regarded as arbitrary and unreasonable as to a property owner who is unable to use his property for any of the permitted purposes and is therefore deprived of all beneficial use thereof.

"Thus we reaffirm the doctrine that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as a taking of property without compensation. *Northwest Merchants Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 A. 2d 743; *Hoffman v. Mayor and City Council of Baltimore*, 197 Md. 294, 79 A. 2d 367; *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587, 117 A. L. R. 1110. To sustain an attack upon the validity of the ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted, * * *." Applying this yardstick, as we must, to appellants' property their case falls. The decree will be affirmed.

DECREE AFFIRMED, WITH COSTS.

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 441

ALONSITA WALKER, ET AL.,

Petitioners,

VS.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Daily Record Co., Baltimore 3, Md.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents concede the correctness of Petitioners' citation of the opinion below, of the jurisdictional statement and of the recitation of constitutional provisions and the ordinance involved in this case.

QUESTION PRESENTED

The sole and simple question presented in this case:

Is a zoning ordinance enacted by duly constituted zoning officials, and upheld by two State Courts, invalid under the Fourteenth Amendment of the Federal Constitution because it prohibits industrial use of the Petitioners' property

while permitting its use for other purposes for which it is reasonably adapted?

The questions claimed by Petitioners to be presented are not remotely involved. Petitioners' purported questions are based on assumptions of fact that are specifically disproved by the findings of the Court of Appeals of Maryland.

Thus in the alleged first question, Petitioners assume that the zoning regulation in this case limits the use of the properties to the impractical and the unprofitable. The Court of Appeals specifically held that "There is no testimony before us to show that by adequate and modern farming operations appellants' [Petitioners'] land could not be as profitable as other lands in Talbot County (Pet. App. B 26).* It also specifically held that there were several practical uses for the properties as zoned (Pet. App. B 32).

In framing this asserted question, Petitioners have also assumed the existence of a finding that industrial use of their properties would cause no disadvantage or loss to the surrounding properties or to the public. No such finding was made either by the Trial Court or by the Court of Appeals of Maryland. The Court of Appeals in its opinion reviewed the direct conflict in testimony on this point (Pet. App. B 32).

In framing an asserted second question, Petitioners have assumed that, in determining the validity of the ordinance as applied to their properties, the Court of Appeals deemed itself barred from considering facts not known to the zoning officials at the time the ordinance was enacted. This is incorrect. The Trial Court did state that facts not brought

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* Figures in parentheses preceded by "Pet. App." are references to the appendix to the Petition filed herein; figures preceded by "App." refer to Petitioners' Appendix in the Court of Appeals of Maryland.

to the attention of the Zoning Officials need not be taken into account by the Court in deciding whether this action was unreasonable (Pet. App. A 15). The Court of Appeals, however, reviewed *all* the facts, including those brought to light subsequent to enactment of the ordinance, in its determination that the industrial adaptability of Petitioners' properties was not "peculiar" to those properties (Pet. App. B 27-30) and in its finding that ". . . the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted." Not only did the Court of Appeals not disregard the issue of peculiar adaptability as a deep water port, it specifically considered it and found ". . . that many other areas in this general locality could be made into deep water ports by the expenditure of practically the same amount of money as would be necessary here" (Pet. App. B 28).

STATEMENT OF THE CASE

The Talbot County Zoning Commission, after careful study and several public hearings, unanimously determined that Petitioners' properties should be zoned for agricultural use. The County Commissioners of Talbot County, after a full public hearing, enacted the Ordinance by unanimous agreement. The validity of the Ordinance was upheld by the Circuit Court for Talbot County. Its decision was affirmed by a unanimous decision of the Court of Appeals of Maryland. Thus, the question of the appropriate zoning classification has been considered by an administrative agency, a legislative body and two Courts, and in each instance, and without a dissenting voice, the decision has been adverse to Petitioners' contentions (Pet. App. A, Pet. App. B 16, 22, 23, 30-31).

Petitioners' statement is a forceful presentation of certain facts and inferences most favorable to their position.

It refers mainly to findings made in the Trial Court, and to testimony of Petitioners' witnesses below. It fails to indicate the following pertinent facts:

1. Petitioners' properties are located in a large agricultural zone, have been used for agricultural and residential purposes for some three hundred (300) years, and together with the similar adjoining properties, are still being so used (App. 227, 271, 292, 300, 313; Pet. App. B 14).

2. There is nothing "peculiar" about Petitioners' properties. The water depth, shore line, underground water resources, access to transportation facilities, etc., which exist with reference to Petitioners' properties, also are present with reference to many properties situated on Talbot County's extensive waterfront, and to most of the properties near the Petitioners' lands (App. 72, 74, 160, 179-180, 183; Pet. App. B 27-28).

3. The evidence of "peculiar suitability" was contradicted, not only by Petitioners' own exhibits and witnesses, but also by testimony produced on behalf of respondents (App. 74, 160, 179-180, 183; Pet. App. B 27-28).

4. The depth of water for a distance of one-half mile off Petitioners' lands is only three or four feet; no port now exists at this site, and to construct one, together with an industrial facility, would cost approximately twenty million to fifty million dollars (App. 173; Pet. App. B 27).

5. It is impossible to determine, with any degree of accuracy, the alleged monetary loss suffered by Petitioners, because there is no evidence whatsoever of the present value of the bulk of Petitioners' properties.

6. There is no evidence in the case that Petitioners' properties could not be farmed as profitably as any other farms in Talbot County, if Petitioners so desired. The evidence

indicates that these properties can be reasonably used for farming, residential purposes, and numerous other uses permitted in an agricultural zone (App. 271-272, 292, 298, 300; Pet. App. B 32).

REASONS FOR DENYING WRIT

It is submitted that the Writ should be denied for the following reasons:

I. The decision of the Court of Appeals of Maryland is not in conflict with any applicable decision of this Court, nor does it involve a Federal question not heretofore determined by this Court.

II. A conflict between the decisions of two States is not among the usual criteria for granting certiorari.

III. The decision of the Court of Appeals of Maryland is not in conflict with the decisions of other State Courts on similar questions.

IV. This case does not present a question of great public importance.

V. There is no conflict in the previous decisions in this case.

I.

The Decision of the Court of Appeals of Maryland is not in Conflict with any Applicable Decision of this Court, nor Does it Involve a Federal Question not Heretofore Determined by this Court.

The Court of Appeals of Maryland, having found that Petitioners' properties were reasonably usable as zoned, held, in effect, that the question of the reasonableness of the classification was fairly debatable, and that in such circumstances, the Court would not intervene to overturn the action of the local legislative body. Having determined

that mere financial loss was not sufficient to invalidate the zoning, and that reasonable use of the property was practical and proper, the Court concluded that the Ordinance, as applied to Petitioners' properties, was not unconstitutional; *Walker v. County Commissioners,* 116 A. 2d 393, 403, 404 (Md. 1955); (Pet. App. B 28-29, 31-33).

Not only is this holding not in conflict with applicable decisions of this Court, but it is difficult to see how, in the face of such applicable decisions, the Court of Appeals could have reached any other result.

Thus, in *Nectow v. Cambridge,* 277 U. S. 183 (1928), property zoned residential was located adjacent to a railroad, and industrial and commercial properties. Considering these facts, as well as the financial factors, it was found that the property was of no practical use for residential purposes, and, therefore, this Court held that the zoning amounted to deprivation of property in violation of the Fourteenth Amendment.

In the instant case, involving property zoned agricultural, used for farming and residential purposes, and surrounded by properties similarly zoned and used, the Court of Appeals held that the property was capable of numerous reasonable uses as zoned (Pet. App. B 32). The Court, therefore, concluded that there was no unconstitutional deprivation of property. The essential finding in *Nectow v. Cambridge, supra,* that the property was incapable of reasonable use as zoned, clearly distinguishes it from the present case.

A case much more in point is that of *Zahn v. Board of Public Works,* 274 U. S. 325 (1927). In that case, property in a largely unimproved neighborhood was zoned residential. It was proved that the property was more valuable for business than for residential purposes. It did not appear,

however, that the property could not be used for residential purposes. On these facts, which are remarkably similar to those in the case at bar, this Court refused to hold the ordinance unconstitutional as applied to the property. Rather, the question of whether the ordinance, as applied, was arbitrary and unreasonable was held to be "fairly debatable" and this Court, therefore, refused to substitute its judgment for that of the legislative body. It is submitted that the holding of the Court of Appeals of Maryland is precisely in accord with the ruling of this Court in *Zahn v. Board of Public Works, supra,* and also follows the general principles laid down in the leading case of *Euclid v. Ambler,* 272 U. S. 365 (1926).

In a number of more recent cases zoning has been upheld against Fourteenth Amendment objections upon findings that the property involved was capable of use as zoned, even though less valuable as zoned. In each of these cases, this Court has denied certiorari; *Marblehead Land Co. v. Los Angeles,* 47 F. 2d 528 (9th Cir. 1931), *cert. denied* 284 U. S. 634 (1931); *DeLana v. Tulsa,* 26 F. 2d 640 (8th Cir. 1928), *cert. denied* 278 U. S. 654 (1929); *Lockard v. Los Angeles,* 33 Cal. 2d 453, 202 P. 2d 38 (1949), *cert. denied* 337 U. S. 939 (1949).

It is submitted that the aforegoing authorities clearly show that the decision of the Court of Appeals of Maryland carefully follows the well-established rule that if property is reasonably usable as zoned, the zoning is not a deprivation of property without due process of law, and in such cases, a Court will not intervene to substitute its judgment for that of the legislative body involved.

It is apparent that no new question is involved in this case. Petitioners advocate a rule that zoning is unconstitutional if it does not permit the most economically advan-

tageous use of property. This Court has repeatedly held that the test of confiscation in zoning is not whether it is zoned for its most advantageous use but whether it may be reasonably used as zoned; *Nectow v. Cambridge* and *Zahn v. Board of Public Works, supra.* This Court has further refused to interfere with the legislative determination of this question when the administrative decision is "fairly debatable"; *Zahn v. Board of Public Works, supra.* We are here concerned with precisely the same sort of issue which this Court refused to review in *Marblehead Land Co. v. Los Angeles, DeLana v. Tulsa,* and *Lockard v. Los Angeles, supra.*

For the aforegoing reasons, Petitioners fail to show the existence of the two express criteria for the granting of Certiorari as set forth in Supreme Court Rule 19 1. (a) (1954).

II.

A Conflict Between the Decisions of Two State Courts is not Among the Usual Criteria for Granting Certiorari.

Petitioner alleges that the decision in this case is in square conflict with decisions in four other States. Rule 19 of this Court indicates that a conflict between decisions of United States Courts of Appeals will be considered in granting certiorari to such Courts, but that, with respect to a State Court decision, the only conflict to be considered is a conflict with this Court's previous rulings.

If in fact this case conflicts with another State decision, such a conflict cannot be corrected by this Court if certiorari is granted, unless the decision in this case is the one which conflicts with decisions of this Court or unless it pertains to a federal question of substance not heretofore determined by this Court.

III.

The Decision of the Court of Appeals of Maryland is not in Conflict With the Decisions of Other State Courts on Similar Questions.

Even assuming that a conflict between decisions of State Courts is a persuasive reason for granting Certiorari (which is doubtful, considering that Supreme Court Rule 19 1. (b) applies only to Federal Courts) no such conflict exists here.

Petitioners cite *Tower Cabana Club v. Chicago*, 5 Ill. 2d 11, 123 N. E. 2d 834 (1955); *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N. E. 2d 813 (1953); and *City of West University Place v. Ellis*, 118 S. W. 2d 907 (Tex. Civ. App. 1938), *aff'd.* 134 Tex. 222, 134 S. W. 2d 1038 (1940), among others, in an attempt to indicate such a conflict. A brief examination of the above cases will indicate that each of them involved property zoned residential located in an area largely commercial or industrial, or otherwise unsuited for residential use. For example, in *Hannifin Corp. v. City of Berwyn, supra*, the property adjoined industrial properties and two railroads, carrying over 139 trains per day. In some, as in *City of West University Place v. Ellis, supra*, the property was topographically unsuited for residential use. The extremely narrow applicability of this case is plainly indicated in the later Texas case of *Dallas v. Lively*, 161 S. W. 2d 895 (Tex. Civ. App. 1942). In each case, the question of financial loss was only one factor considered. In each case, after weighing all the numerous factors involved, the Court found that the property could not be reasonably used as zoned.

The case of *Comer v. City of Dearborn*, 342 Mich. 471, 70 N. W. 2d 813 (1955) presents the obverse side of the same coin. In that case property in a zone which the Court found to be not then, or for a long time thereafter likely to be,

utilized for industrial purposes, was restricted to industrial use and dwellings were prohibited. Having concluded that the neighborhood was not an industrial one, the Court held that the ordinance, as applied, was unreasonably restrictive because the prohibition of dwellings in a non-industrial area had no relation to public health, safety and welfare.

It is true that in the case of *Vernon Park Realty Co. v. Mount Vernon*, 307 N. Y. 493, 121 N. E. 2d 517 (1954) the Court of Appeals of New York used language suggesting that it might invalidate a zoning ordinance which precluded the use for which property was most readily adapted. Such a rule, if based on Federal Constitutional grounds, would certainly be in conflict with the holding of the case at bar, and also with the holding of every other case in point which respondents have been able to locate, including the applicable decisions of this Court; see especially *Zahn v. Board of Public Works, supra.*

But it is far from clear that such is the holding of the *Vernon Park* case. It may well be that the Mount Vernon ordinance was held unconstitutional because highly discriminatory, in that it zoned certain property in a way different from the very similar adjoining properties, a situation not present in the instant case; see criticism of this decision in 68 Harv. L. Rev. 1089, 1090 (1955). That the New York Court did not use the "most readily adapted" test is further indicated by its citation, in support of the *Vernon Park* decision, of the leading New York case of *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587 (1938), which clearly enunciates the "reasonably usable" rule applied by the Court of Appeals of Maryland, and enunciated by this Court.

It is also not clear whether the Court of Appeals of New York decided any Federal Constitutional question. It did

not consider at length the Fourteenth and Fifth Amendments, and similar provisions of the New York Constitution could have afforded a sufficient basis for the decision.

It is suggested that Petitioners have erroneously assumed the presence of conflict from the existence of varying conclusions based on factual situations completely unlike those appearing in the instant case.

IV.

This Case Does not Present a Question of Great Public Importance.

This is a routine zoning case in which four adjacent farms and residences in the midst of an agricultural district have been zoned, together with the general area surrounding them, agricultural. The owners of the property desire that they be zoned industrial. A decision in this case can only affect these four properties and can hardly be considered of public importance except as to the limited public consisting of Petitioners and their opposing neighbors.

V.

There is no Conflict in the Previous Decisions in this Case

This Court is asked by Petitioners to review the facts pertaining to the zoning of their properties for the fifth time.

The Planning and Zoning Commission of Talbot County was aware of the desire of an oil refinery to use Petitioners' properties and its unanimous determination was that the proper zone was agricultural. A similar conclusion was reached by the County Commissioners of Talbot County when they enacted the zoning ordinance. The Circuit Court for Talbot County heard testimony for four days as to the appropriate use of Petitioners' properties and found them

to be properly zoned. The Court of Appeals of Maryland in Equity cases has the right to, and in this case did, review the voluminous testimony and exhibits. While it failed to agree with the lower Court in some of the particulars of its findings, (especially in respect to those findings quoted in Petitioners' Petition at pages 4 and 5) it unanimously affirmed the decision and found the properties in question to be properly zoned.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

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NOV 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 441

ALONSITA WALKER, ET AL.,
Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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PUBLIC IMPORTANCE OF THE CASE

Respondents aver in their brief that this case does not present a question of great public importance and that it is only of importance to the Petitioners and their opposing neighbors. For a case of such limited importance, it is indeed peculiar that one hundred and fifty-two taxpayers and property owners, together with the Bay Hundred Anti-Zoning League having more than five hundred members, intervened as parties plaintiff. Almost every occurrence in the case has received front page coverage in Talbot County's leading newspaper and each important turn has

been reported in other newspapers of the State of Maryland, including the daily newspapers of Baltimore City.

The reasons for the widespread interest in the case are manifold. This case will decide whether major seaports in the State of Maryland will be limited in depth to the thirty feet which exists in Baltimore harbor or will be expanded to admit the largest capital ships afloat in the forty-five feet of water at the seaport which Petitioners desire to construct. This case will decide whether young people in Talbot County will continue to be compelled to leave the county to seek employment or will join all people in the area in the enjoyment of a new prosperity. The ultimate decision in this case will determine whether property values, not only of the petitioners' property but all surrounding properties, will be increased. It will decide whether the precious natural resources which make the petitioners' property the most suitable site for general modern industry on the Atlantic seaboard which has not already been occupied by industry or the military services shall go to waste or be used for the purposes for which nature must have intended. This case will decide whether a project which has been officially declared by the Office of Defense Mobilization to be necessary for national defense will be used for national defense or not. Another determination will be whether the overwhelming majority of the people of Talbot County who want industry will receive or be denied the benefits which it would bring to them.

It will also be important to the nation as a whole to have a fresh decision from the Supreme Court of the United States on the subject of zoning which has not been ruled upon by this Court in the twenty-seven years since the decision in Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842.

CONFLICTING STATE COURT DECISIONS

Respondents contend that a conflict between the decisions of the highest courts of two states on a federal question may not be considered by this Court. This contention is at variance with the following statement in Supreme Court Practice (1954 Edition) by Robert L. Stern and Eugene Gressman, page 141:

> "A conflict between the decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme Court review."

DEPRIVATION OF PROPERTY RIGHTS

It is true that the Court of Appeals of Maryland stated in its opinion that "it could be reasonably found that appellants' property was no more suitable for a deep water port than many other locations along the Chesapeake Bay with the expenditure of the same amount of money required here". However, this statement is not only unsubstantiated by any evidence but is completely erroneous. It is in conflict with the uncontradicted testimony of eminent expert witnesses who testified that this site is the most suitable on the Atlantic seaboard which has not already been occupied by industry or the military services. The Judge of the Circuit Court for Talbot County stated that the Petitioners established by the evidence "that the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available" (Petitioner's Appendix A, p. 14). The Court of Appeals statement that "the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted" is likewise unsubstantiated by the evidence. The property consists of unprofitable farmland (App. 210, 298), poor marshland (App. 43, 211, 212, 298) and cut over woodland

(App. 296, 297). The income from the land is less than the amount of taxes (App. 211).

Petitioners therefore lost in the lower court where the judge made proper findings of fact, based on the uncontradicted evidence in the case, but erroneously applied the law by declaring that the facts could not be considered because they were not known at the time of the enactment of the zoning ordinance. Petitioners lost in the Court of Appeals of Maryland because of findings of fact which were unsupported by the evidence, contrary to the findings of the trial judge who heard the evidence and in conflict with the uncontradicted evidence in the case. Petitioners feel that they are entitled to correct findings of both fact and law. The correct findings of fact of the lower court concerning the peculiar suitability of Petitioners' property, when combined with the correct rule of law that these facts can be considered even if they were not known when the ordinance was enacted, establish the unquestionable merit of the Petitioners' cause. These uncontradicted facts establish, as was done in the Nectow case, that the uses which the zoning ordinance permits on the property are "of comparatively little value" and the ordinance is therefore unconstitutional insofar as it applies to the property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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